No. 93-956 (3)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

In re INVESTMENT BANKERS, INC., Debtor.

DAVIS, GILLENWATER & LYNCH; and GILBERT K. DAVIS, individually and as a partner of Davis, Gillenwater & Lynch,

Petitioners,

vs.

JAMES H. TURNER, TRUSTEE, and SECURITIES INVESTOR PROTECTION CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

In July 1981, Investment Bankers, Inc. ("IBI"), a securities broker-dealer, remitted checks totalling $36,858 to Gilbert K. Davis, Esquire, and his law firm, Davis, Gillenwater & Lynch ("DG&L"). A couple of days before receiving the checks, Mr. Davis and his firm had been retained by IBI and two of its principals in connection with an impending suit against them by the Securities and Exchange Commission ("SEC") for alleged stock manipulation and failure to meet financial responsibility requirements. The checks were remitted on the same day that the SEC actually filed its complaint in district court against IBI and its principals, and were for services rendered over the past two days and a retainer for future services. That day, the SEC also obtained an order which prevented IBI from doing business and limited its disbursement of funds. Prior to the hearing resulting in the entry of that order, Mr. Davis converted the checks received from IBI to cashier's checks.

Concurrently with the filing of the SEC complaint, the Securities Investor Protection Corporation ("SIPC") filed in district court an application for a customer protective decree as to IBI, under the Securities Investor Protection Act, 15 U.S.C. §78aaa *et seq.* ("SIPA"). The application was granted five days later, and resulted in IBI being placed in liquidation under SIPA, the appointment of James H. Turner, Esquire, as trustee, and the removal of the liquidation proceeding to the bankruptcy court under SIPA section 78eee(b)(4).* In early January 1982, Mr. Turner sued Mr. Davis and DG&L in bankruptcy court, to avoid the payments to them as preferences or fraudulent conveyances under sections 547 and 548 of the Bankruptcy Code, 11 U.S.C. §§547 and 548, and as having been made in violation of sections 327 and 329 of the Code, 11 U.S.C. §§327 and 329. Each of the foregoing sections of the Code

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* For convenience, references herein to provisions of SIPA shall be to the United States Code, and shall omit "15 U.S.C."

applied by reason of SIPA section 78fff(b). While agreeing that the transfers were otherwise avoidable and improper under the Code, the Bankruptcy Court concluded that it lacked jurisdiction over the dispute, in view of the Bankruptcy Amendments and Federal Judgeship Act of 1984. On appeal, both the District Court and Court of Appeals disagreed with the Bankruptcy Court as to jurisdiction. Thus, the issue is

> Whether bankruptcy courts have jurisdiction to consider adversary proceedings that are brought within SIPA liquidation proceedings and that arise under provisions of the Bankruptcy Code where
>
> 1) SIPA section 78eee(b)(4) requires removal of the SIPA liquidation proceeding to the bankruptcy courts;
>
> 2) the action in question arises under sections 327, 329, 547 and 548 of the Bankruptcy Code, made applicable by SIPA section 78fff(b) which, in relevant part, requires that to the extent consistent with SIPA, the SIPA liquidation proceeding "be conducted in accordance with, and as though it were being conducted" under specified sections of the Bankruptcy Code, including sections 327, 329, 547 and 548, and there is no inconsistency between those sections and SIPA; and
>
> 3) the defendants filed a claim in the SIPA liquidation proceeding before the Bankruptcy Court and counterclaims in the instant adversary proceeding also before the Bankruptcy Court, thereby consenting to that court's jurisdiction.

LIST OF PARTIES

The parties to the proceeding are as stated in the Petition for Writ of Certiorari, except as follows:

1) O'Connor and Hannan, and not O'Connor and Hannon;** and

2) the Securities Investor Protection Corporation ("SIPC"), and not the Securities *Investment* Protection Corporation.

SIPC is created pursuant to a federal statute, and has no parent companies or subsidiaries.***

** The law firm of O'Connor & Hannan was named as a co-defendant in the suit, but has since fully satisfied its obligation to the Trustee.

*** SIPC's participation in this matter has been pursuant to SIPA section 78eee(d). In pertinent part, under that provision, SIPC is a party in interest as to all matters arising in a SIPA liquidation proceeding, "with the right to be heard on all such matters."

RELEVANT STATUTORY PROVISIONS

There is no issue presented under the Seventh Amendment to the United States Constitution in this case and therefore, the petitioners' citation of the Amendment at page 3 of the Petition for Writ of Certiorari is inappropriate.

In addition to the other provisions of law identified by the Petitioners, the following are applicable:

1) 15 U.S.C. §78bbb;

2) 15 U.S.C. §78eee(b)(4), *prior to amendment* (1978);

3) 15 U.S.C. §78fff(b);

4) 11 U.S.C. §547(b);

5) 11 U.S.C. §548(a);

6) 1 U.S.C. §204(a)

The foregoing provisions are set forth in the statutory appendix to this brief.

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

On July 15, 1981, upon an application by SIPC, the United States District Court for the District of Colorado ("District Court") placed Investment Bankers, Inc. ("IBI" or "the Debtor") in liquidation under SIPA, and appointed James H. Turner, Esquire, as trustee to administer the liquidation. Pursuant to SIPA section 78eee(b)(4), the District Court removed the liquidation proceeding to the Bankruptcy Court for the same district ("the Bankruptcy Court").

Consistent with SIPA section 78fff-2(a)(1) and with the Bankruptcy Court's permission, the Trustee caused notice of the liquidation proceeding to be published, and had cop-

ies of the notice and claims materials mailed to customers and other creditors of the Debtor. On September 1, 1981, the Trustee received a claim from Petitioner Davis for a cash credit balance and some securities. In the claim, he disclosed that he was an attorney who had represented the Debtor and its principals. The Trustee did not determine the claim. Instead, on January 19, 1982, based on 28 U.S.C. §1471 and SIPA section 78fff(b), the Trustee commenced the instant adversary proceeding in the Bankruptcy Court, based on the Debtor's transfer of $36,858 to the petitioners on the day that SIPC filed the application to have the firm placed in liquidation. The petitioners answered and counterclaimed. A8-A11.[1]

A trial was held in August 1984 and July 1985. On December 10, 1985,[2] the Bankruptcy Court filed a Memorandum Opinion and thereafter entered judgment. A11, A115.

The court concluded that it lacked jurisdiction in view of the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"). A139-A147. Under 28 U.S.C. section 157 which is part of the BAFJA, Pub. L. No. 98-353, 98 Stat. 340 (1984), only Title 11 cases, and proceedings arising under or in or related to cases under Title 11, may be referred to bankruptcy judges. In the court's view, the adversary proceeding arose under SIPA, which is contained in Title 15 and not Title 11 of the United States Code. The court rejected SIPC's contention that SIPA section 78eee(b)(4) provided a basis for removal to it of the adversary proceeding. It also disagreed that section 78eee(b)(4) should be interpreted so as to effectuate the legislative intent. The bankruptcy judge stated:

> It is further asserted that a literal interpretation of present statutes would result in an absurdity of re-

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[1] References herein to pages of the Appendix shall be to "A___." References to the Petition for Writ of Certiorari shall be to "Cert. Pet."

[2] The "reprint" of the Memorandum Opinion in the Petitioners' Appendix incorrectly reflects the date as December 20, 1985. See A165.

> quiring district courts to "remove" SIPA cases to themselves. ". . . A literal application of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative." [*Sic*] . . . .
>
> There are several difficulties with the proposition advanced by SIPC. *First, it must be observed that much of what Congress promulgated in the 1984 BAFJA results in absurdity. This is but one example* . . . . [emphasis added and citation omitted]

A143. Finally, the court failed to consider the effect of SIPA section 78fff(b) upon its jurisdiction.

Section 78eee(b)(4) had been made unclear as a result of the enactment of the BAFJA. In relevant part, the SIPA section required removal to "the court of the United States in the same judicial district having jurisdiction over cases under title 11." Under the Bankruptcy Reform Act of 1978 ("1978 Reform Act"), the latter courts were the bankruptcy courts. Pub. L. No. 95-598, 92 Stat. 2668 (1978); *Northern Pipeline Const. v. Marathon Pipe Line Co.*, 458 U.S. 50, 54 n.3 (1982) ("*Marathon*"). In that context, the intent of section 78eee(b)(4) was plain: SIPA proceedings were to be removed from the district court in which the SIPC application had been filed to the bankruptcy court for the same district. However, in the aftermath of *Marathon*—with the substitution of the jurisdictional provisions of the BAFJA for those of the 1978 Reform Act—the meaning of section 78eee(b)(4) was obscured. Because the courts with ultimate jurisdiction over Title 11 cases were now the district courts, see Pub. L. No. 98-353, 98 Stat. 333 and 340 (1984), a literal application of section 78eee(b)(4) would have required the district court to remove the proceeding to itself.

Although section 78eee(b)(4) had become facially meaningless, the Bankruptcy Court refused to discern and apply the legislative intent, stating that a provision requiring a

court to remove a proceeding from itself to itself is not ambiguous:

> Further, resorting to legislative history is only appropriate where the language of a statute is ambiguous .... Where the language of a statute is clear, use of committee reports, legislative comments, and the like is unnecessary .... *There is no ambiguity in any of the language of statutes under consideration here.* [Emphasis added and citations omitted]

A144. In spite of the finding of lack of jurisdiction, the court proceeded to decide the merits of the case in the event that it was mistaken as to its jurisdiction. It concluded that a $25,000 retainer paid to the petitioners was voidable as a fraudulent transfer under 11 U.S.C. §548(a)(2), and that a payment of $11,858 to them was voidable as a preference under 11 U.S.C. section 547 and as not in compliance with 11 U.S.C. section 329. A157-A164.

On appeal, the finding as to jurisdiction was reversed. A1-A106.

SUMMARY OF ARGUMENT

This Court should not grant the petition for a writ of certiorari for the following reasons:

1. There is no conflict between the decision of the Tenth Circuit and of any other court. At bottom, SIPA liquidation proceedings are ordinary bankruptcy proceedings with special customer protection features. There is substantial authority in SIPA for the removal of such proceedings to the bankruptcy courts, and for the consideration by the latter courts of adversary proceedings brought within them. Thus, once the district court places the broker-dealer in SIPA liquidation, it must remove the proceeding to the bankruptcy court under SIPA section 78eee(b)(4). Furthermore, SIPA section 78fff(b) mandates that the SIPA proceeding be conducted not only in accordance with, but *as though* it were being conducted under specified provi-

sions of the Bankruptcy Code, including those that are at issue. Finally, 28 U.S.C. section 157(b)(1) supplies another basis for jurisdiction. The Bankruptcy Court had jurisdiction under that section because the instant adversary proceeding not only is a core proceeding arising under provisions of Title 11, made applicable by SIPA section 78fff(b), but because it arises in a case under Title 11. The SIPA liquidation proceeding is a Title 11 *and* Title 15 case.

2. Petitioners never requested a jury trial in this case, and accordingly, they inappropriately rely upon *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989) (*"Granfinanciera"*). The authority of the Bankruptcy Court to consider this adversary proceeding was reinforced by the petitioners' filing of a claim against the Debtor's estate and of counterclaims for payment from the estate. As a result, the instant suit became an integral part of the restructuring of the debtor-creditor relationship subject to the jurisdiction of the Bankruptcy Court.

3. Petitioners raise no question worthy of review. The issue is significant only to the parties involved, and has no importance beyond the narrow confines of SIPA cases.

ARGUMENT

This adversary proceeding was brought within the context of a SIPA liquidation proceeding. Because an understanding of the nature of the proceeding is critical to a proper resolution of the petition, the history of SIPA, as well as its purposes and relevant provisions, are examined below. That examination shows that at bottom, the proceeding is no more than an ordinary bankruptcy liquidation case, with special customer protection features.

Nature of a SIPA Proceeding: Its History and Purposes

Prior to 1938, customers of a bankrupt stockbroker were considered as general creditors if they could not reclaim cash or securities which they could trace into the broker's possession. *Duel v. Hollins*, 241 U.S. 523, 527-29 (1916).

Because serious inequities could and did result from this method of reclaiming, Congress enacted section 60(e) of the Bankruptcy Act in 1938.

A. Section 60(e) of the Bankruptcy Act

Section 60(e) of the former Bankruptcy Act, 11 U.S.C. §96(e) (repealed 1979), permitted "cash customers," as defined therein, to reclaim fully paid securities which were "specifically identifiable" as their property. Otherwise, customers' cash, securities or property of a similar character (not "specifically identifiable") constituted a "single and separate fund" to be applied in satisfaction of customers' claims (other than for specifically identifiable property) on a *pro rata* basis, subject only to prior payment of certain administrative expenses. As for the unpaid balance of their "net equities," customers shared with general creditors in the general estate. See 3 *Collier on Bankruptcy*, ¶¶60.71-60.76 (14th ed. 1977).

Because of the usually inadequate single and separate fund, section 60(e) did not prevent customer losses. Customer exposure mounted when the rate of stockbroker failures accelerated in the 1960s. Congress responded to the crisis by enacting SIPA. *SIPC v. Barbour*, 421 U.S. 412, 415 (1975).

B. SIPA and SIPA as Amended

With some adjustments, SIPA expressly continued the substantive scheme of section 60(e). Customers were still entitled to the return of their "specifically identifiable property," and to their share of the single and separate fund. §78fff(c)(2)(A)—(C) (1970). The major impact of SIPA on customer recoveries was to reduce losses by providing a limited back-up through SIPC funds. In essence, SIPA improved "collectability" while adhering to the section 60(e) philosophy of according customers limited preferential rights based on their actual securities and cash positions entrusted to the broker.

In 1978, SIPA was amended to provide greater flexibility to SIPC in satisfying customer claims in an expe-

ditious fashion.[3] The essential elements of a SIPA proceeding remained unchanged.

C. SIPC and Its Funds

SIPC is a non-profit corporation whose members include most interstate broker-dealers. §78ccc(a)(2)(A).

SIPA requires SIPC to establish a fund via assessments upon its members. §78ddd(a)(1). If the fund should become inadequate, SIPA authorizes a borrowing against the U.S. Treasury of up to one billion dollars. §78ddd(f)—(h). These resources are available for the satisfaction of customer claims within certain limits.

D. Use of SIPC Funds to Satisfy Customer Claims

SIPA requires the distribution of "a quasi-public fund." *SEC v. Packer, Wilbur & Co.*, 498 F.2d 978, 980 (2d Cir. 1974). Under section 78fff-3(a), SIPC is authorized to advance to the trustee, in order to satisfy net equity claims of customers, up to $500,000 per customer of which no more than $100,000 may be used to satisfy a claim which is for cash rather than for securities. Regardless of the assets of the failed firm, each customer eligible for protection is assured of satisfaction within the SIPA limits. However, SIPA does not attempt to make all customers whole and SIPC's role is carefully delineated. It contemplates that customers' claims will be satisfied to the maximum extent possible from the assets of the defunct member firm. §78fff-2(c)(1). To the extent of its advances, SIPC is subrogated to the claims of such customers. §78fff-3(a). *See SIPC v. Associated Underwriters, Inc.*, 423 F.Supp. 168, 170-173 (D. Utah 1975).

E. Bankruptcy Nature of a SIPA Proceeding

It is useful to consider SIPA as an "engraftment of insurance provisions upon the preexisting Section 60(e)

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[3] SIPA has been amended by Pub. L. No. 95-283, 92 Stat. 249 (1978); Pub. L. No. 95-598, 92 Stat. 2549 (1978); Pub. L. No. 96-433, 94 Stat. 1855 (1980); Pub. L. No. 97-303, 96 Stat. 1409 (1982); and Pub. L. No. 100-181, 101 Stat. 1265 (1987).

bankruptcy provisions applicable to stockbrokers. . . ." *SEC v. Aberdeen Securities Co.*, 480 F.2d 1121, 1123 (3d Cir.), *cert. den. sub nom., Seligsohn v. SEC*, 414 U.S. 1111 (1973). Thus, notwithstanding the special protection afforded customers, a proceeding under SIPA essentially is a bankruptcy liquidation. See, *e.g.*, *SIPC v. Ambassador Church Finance/Development Group, Inc.*, 788 F.2d 1208, 1210 (6th Cir.), *cert. den. sub nom., Pine Street Baptist Church v. SIPC*, 479 U.S. 850 (1986); *SEC v. Albert & Maguire Sec. Co.*, 560 F.2d 569, 572 (3d Cir. 1977); *Exchange National Bank v. Wyatt*, 517 F.2d 453, 457-459 (2d Cir. 1975). Indeed, one of the stated goals of the proceeding is "to liquidate the business of the debtor." SIPA §78fff(a)(4). The application to commence a proceeding is filed by SIPC in federal district court, §78eee(a)(3), which puts into effect the Bankruptcy Code's automatic stay. 11 U.S.C. §362(a). If the court grants the application, it appoints a trustee to administer the liquidation and removes the proceeding to the bankruptcy court for that district. §78eee(b)(3) and (b)(4). To the extent consistent with SIPA, the SIPA proceeding is to "be conducted in accordance with, and as though it were being conducted under chapters 1, 3, and 5 and subchapters I and II of chapter 7" of the Bankruptcy Code. §78fff(b).

Because the SIPA proceeding effectively is a bankruptcy proceeding, it looks not only to the disposition of claims of customers, but also to the claims of general creditors. *In the Matter of Lewellyn*, 26 B.R. 246, 253 (Bankr. S.D. Iowa 1982); *Gold v. Hyman*, [1974-75 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶95,043 at p. 97,657 (S.D.N.Y. 1975). To enable the trustee to carry out his responsibilities not only to customers but to the entire bankruptcy estate and its creditors, the trustee is given the same powers and title with respect to the debtor and its property as a trustee in bankruptcy, as well as powers that will enable him to perform the special functions of a SIPA liquidation. §78fff-1(a). *See SIPC v. Christian-Paine & Co.*, 755 F.2d 359, 361 (3d Cir. 1985). Estate property collected by the trustee

is distributed as specified in section 726 of the Bankruptcy Code. §78fff(e).

A SIPA proceeding has elements that differ from those of a bankruptcy proceeding. For example, the trustees and their counsel, while appointed by the district courts, are selected by SIPC. §78eee(b)(3). The trustee is responsible for mailing notices to customers and other creditors. §78fff-2(a)(1). Claims are submitted to the trustee instead of the court. §78fff-2(a)(2).

I. THE DECISION OF THE TENTH CIRCUIT IS IN ACCORD WITH THE LEGISLATIVE HISTORY OF, AND CASE LAW UNDER, SIPA.

Contrary to petitioners' contention, Cert. Pet. at 11-31, there is ample authority for bankruptcy judges to consider suits arising under provisions of the Bankruptcy Code in the context of a SIPA liquidation. As discussed below, the decision of the Tenth Circuit is in accord with the pertinent case law and with the legislative history of SIPA. Accordingly, there is no conflict that needs to be resolved by this Court.

Notwithstanding the enactment of the BAFJA, two sections of SIPA, 78eee(b)(4) and 78fff(b), supply a basis for the exercise of jurisdiction by the bankruptcy courts in SIPA cases. Each is considered in turn below.

Section 78eee(b)(4) is headed "Removal to Bankruptcy Court" and specifies that upon the issuance of the customer protective decree and appointment of a trustee, the district court "shall forthwith order the removal of the entire liquidation proceeding to the court of the United States in the same judicial district having jurisdiction over cases under title 11." The section also provides that the "latter court shall thereupon have all of the jurisdiction, powers, and duties conferred by" SIPA upon the district court ordering the removal. Because the courts with jurisdiction over Title 11 cases are now the district courts, a literal application of section 78eee(b)(4) requires the district court entering the customer protective decree to re-

move the proceeding to itself. Although section 78eee(b)(4) appears facially meaningless as a result of the BAFJA,[4] to avoid an interpretation that results in a "self-nullification" of the provision and produces an unreasonable result, as a court must, *see Gemsco, Inc. v. Walling*, 324 U.S. 244, 255 (1945), it is necessary to determine the purposes of SIPA, and specifically of section 78eee(b)(4), and to apply the statute in a way which will effectuate those purposes.

> It is the duty of [the] Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose sacrificing, if necessary, the literal meaning in order that the purpose may not fail.

Takao Ozawa v. United States, 260 U.S. 178, 194 (1922). *See E.E.O.C. v. Commercial Office Products Co.*, 486 U.S. 107, 120-121 (1988) (court will not countenance interpretation of statutory language leading to absurd or futile results); *United States v. N.E. Rosenblum Truck Lines*, 315 U.S. 50, 55 (1942); *Hill v. American Surety Co.*, 200 U.S. 197, 203 (1906). Adducing the intended meaning of section 78eee(b)(4) is also necessary to determine whether a conflict exists between it and the BAFJA, and if so, which statute must be enforced. *See Watt v. Alaska*, 451 U.S. 259, 265-67 (1981).

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[4] Inasmuch as all of the jurisdiction, powers, and duties which it purports to confer already reside in the district court upon the filing of the application to have the SIPC member placed in liquidation, see SIPA §78eee(b)(2)(A)(iii), the second clause of section 78eee(b)(4) also becomes meaningless or superfluous, in contravention of the rule that no part of a statute is to be construed as to be rendered superfluous. *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609, 633 (1973).

A. The Intended Meaning and Purposes of Section 78eee(b)(4)

The relevant case law under, and history of, SIPA bear out the conclusion that Congress specifically intended that the proceedings be considered by the bankruptcy courts. Although, contrary to Petitioners' contention, the original version of SIPA did not expressly include a removal or referral provision, Cert. Pet. at 13, the Second Circuit concluded in *Exchange National Bank of Chicago v. Wyatt*, 517 F.2d 453 (2d Cir. 1975) ("*Wyatt*"), that referral of the proceedings to the bankruptcy courts effectuated the purposes of SIPA. In doing so, the court examined 1) section 5(b)(2) of SIPA, 15 U.S.C. §78eee(b)(2) (1970), giving to the district courts exclusive jurisdiction over the debtor and its property and the powers of a bankruptcy court and of a court in a proceeding under chapter X of the Bankruptcy Act;[5] 2) section 6(c)(1), 15 U.S.C. §78fff(c)(1) (1970), providing that the SIPA proceeding would be conducted "in accordance with, and as though it were being conducted under," specified provisions of the Bankruptcy Act; and 3) section 6(c)(2), 15 U.S.C. §78fff(c)(2) (1970), setting forth provisions that were unique to a SIPA liquidation. The court observed that since section 22 of the Bankruptcy Act, providing for a general reference of cases to referees in bankruptcy, was contained in a chapter of the Act which was applicable to a SIPA proceeding, reference of the SIPA proceeding would be proper. 517 F.2d at 456. The power of the district court to refer SIPA proceedings to referees in bankruptcy was not only "con-

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[5] In 1970, while specifying that a debtor under SIPA would not be reorganized, SIPA incorporated provisions of the Bankruptcy Act applicable to reorganization proceedings. In 1978, "since the aim of a SIPA proceeding is the liquidation, not reorganization, of a member," Congress deleted the reference to the reorganization provisions and expressly made the liquidation provisions applicable. *Hearings on H.R. 8331 Before the Subcommittee on Consumer Protection and Finance of the House Committee on Interstate and Foreign Commerce*, 95th Cong., 1st Sess., at 175-76 (1977). *See* Pub. L. No. 95-283, 92 Stat. 259 (1978), and Pub. L. No. 95-598, 92 Stat. 2675 (1978).

sistent with the purposes of SIPA but essential." 517 F.2d at 457. As the Second Circuit observed:

> The process for the determination of ["customer"] claims [in a SIPA proceeding] did not differ in any significant respect from what would have been required in a large stockbroker bankruptcy before enactment of SIPA; the difference lies in the supersession of § 60, sub. e of the Bankruptcy Act by the somewhat altered Special Provisions of §6(c)(2) of SIPA and the entitlement of "customers" as therein defined to benefit from the SIPC Fund. *This is the kind of business for which bankruptcy judges have developed special expertness and administrative skills and which Congress did not intend to dump on already overburdened district courts without needed clerical and other facilities.* [emphasis added].

517 F.2d at 457-58.[6]

Congress's intent that SIPA matters be heard by bankruptcy courts was made clear twice in 1978, when it first amended the statute to include section 78eee(b)(4), and when, several months later, it revised that section to its current form. The provision initially authorized the district court "at any stage of the [SIPA] proceeding, [to] refer the proceeding to a referee in bankruptcy to hear and determine any or all matters, or to a referee in bankruptcy

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[6] The notion that the bankruptcy court is best-equipped to handle the liquidation of financially failing securities broker-dealers continues to find support. See *S.E.C. v. American Bd. of Trade, Inc.*, 830 F.2d 431, 436-438 (2d Cir. 1987), and Anthony Michael Sabino, *The Role of Bankruptcy Courts in Stockbrokerage Liquidations*, 16 Sec. Reg. L. J. 227 (Fall 1988). In *American Board of Trade*, the Second Circuit expressed misgivings over the use of a district court equity receivership to effectuate the liquidation of insolvent entities, stating that the district court had undertaken to oversee routine bankruptcy matters, "without the aid of either the experience of a bankruptcy judge or the guidance of the bankruptcy code." 830 F.2d at 438. The Court of Appeals admonished that in the future, such receiverships were not to be continued "beyond the point necessary to get the estate into the proper forum for liquidation—the bankruptcy court." *Id.* at 437.

as special master to hear and report generally or upon specified matters." Pub. L. No. 95-283, 92 Stat. 257 (1978). In adding the section, Congress explained:

> Authority for the existing practice of referring all or part of a liquidation proceeding to a referee in bankruptcy, thereby in many cases expediting liquidation proceedings, is clarified. See, e.g., [*Wyatt*].

S. Rep. No. 763, 95th Cong., 2d Sess. 10 (1978). Subsequently, the 1978 Reform Act made certain amendments to SIPA to conform it to the Bankruptcy Code. *See* S. Rep. No. 989, 95th Cong., 2d Sess. 19 (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5805. Section 78eee(b)(4) was amended to its present form, providing for removal to the "court of the United States in the same judicial district having jurisdiction over cases under title 11." Pub. L. No. 95-598, 92 Stat. 2674 (1978). The intended court was the bankruptcy courts because under 28 U.S.C. §1471(c) (1978), they would exercise all of the jurisdiction of the district courts including jurisdiction over Title 11 cases.

Although SIPA was thereby brought in line with the broader jurisdiction and powers which the 1978 Reform Act conferred upon bankruptcy courts, Congress already independently had demonstrated its intent that SIPA liquidation proceedings be considered by the bankruptcy courts. Thus, in section 78eee(b)(4), as originally enacted, Congress expressly provided for referral of all or part of the proceedings to bankruptcy referees to make clear its intent, because such referrals would "expedite" the liquidations. When considered with SIPA section 78fff(b), *infra*, making Title 11 provisions applicable to a SIPA proceeding, the intent of current section 78eee(b)(4) is plain that except for the special protection afforded customers, SIPA liquidation proceedings are to be administered no differently than ordinary Title 11 bankruptcies. Unless Congress has now repealed section 78eee(b)(4) (which it has not), that intent must be given effect.

B. Fundamental Rules of Statutory Construction Dictate That Section 78eee(b)(4) Not Be Deemed Repealed.

The petitioners cavalierly dismiss section 78eee(b)(4). Yet, neither the BAFJA nor its legislative history mention SIPA, and there is nothing in them from which a repeal of the provision may be implied.

It is a "cardinal" rule of statutory construction that repeals by implication are not favored. *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936); *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168-69 (1976); *Watt v. Alaska, supra*, 451 U.S. at 267. Unless there is a clear legislative intent to repeal, a repeal by implication occurs only if there is a "manifest inconsistency" or "positive repugnance" between two statutes. *Mercantile National Bank at Dallas v. Langdeau*, 371 U.S. 555, 565 (1963). *See Rosenberg v. United States*, 346 U.S. 273, 294-295 (1953); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 189-190 (1978). Even in the latter circumstance, the repeal is only "*pro tanto*, to the extent of the repugnancy." *United States v. Borden Co.*, 308 U.S. 188, 199 (1939). Furthermore, regardless of the order in which statutes are enacted, a general statute does not supersede a specific one unless the congressional intent is clear.

> [T]he Indian preference statute is a specific provision applying to a very specific situation. The 1972 Act, on the other hand, is of general application. Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one regardless of the priority of enactment. . . .
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> The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intent to the contrary, to regard each as effective. ". . . . The intention of the legislature to repeal 'must be clear and manifest.' "

Morton v. Mancari, 417 U.S. 535, 550-51 (1974) (citations omitted). *See Bulova Watch Co. v. United States*, 365 U.S. 753, 761 (1961); *Amrep Corp. v. F.T.C.*, 768 F.2d 1171, 1175-76 (10th Cir. 1985), *cert. den.*, 475 U.S. 1034 (1986). There is obviously no "clearly expressed congressional intent" to repeal section 78eee(b)(4). Furthermore, under the facts of this case, section 78eee(b)(4) is fully consistent with the BAFJA.

1. The Removal Clause of Section 78eee(b)(4)

The removal portion of section 78eee(b)(4) is consistent with the BAFJA. Initially, the BAFJA vests jurisdiction over Title 11 cases, proceedings, and related proceedings, in the district courts. The district courts may then refer the cases and proceedings to the bankruptcy courts. 28 U.S.C. §157(a). To implement section 157(a), the District Court adopted General Procedure Order No. 1984-3 ("GPO 1984-3"), under which all Title 11 cases and proceedings, and proceedings arising in or related to Title 11 cases, are "automatically referred" to the bankruptcy judges. GPO 1984-3, ¶2. In a similar vein, SIPA preliminarily vests jurisdiction over SIPA cases in the district courts, §78eee(b)(2), and then requires the district courts to remove them to the bankruptcy courts. §78eee(b)(4).

The main distinction between section 157(a) and SIPA is that referral under section 157(a) is discretionary with the district courts, while removal under SIPA is mandatory. As a practical matter, the difference between an automatic referral and a mandatory removal is insignificant, and plainly does not rise to the level of "manifest inconsistency" warranting that only one of the statutes be enforced. Furthermore, the district court's authority to withdraw a case or proceeding under section 157(d) can be reconciled with removal under SIPA. While section 78eee(b)(4) does not provide for a withdrawal, it does not prohibit it. In light of the BAFJA, SIPA section 78eee(b)(2)(A)(iii) now means that the district court in a SIPA case has the same powers and jurisdiction as a district court in a Title 11 case, except as inconsistent with

SIPA.[7] Thus, like the district court in an ordinary bankruptcy case, the district court in a SIPA case, if necessary, could also withdraw any portion or all of a SIPA case or proceeding.[8]

The above interpretation is consistent with the rules of statutory construction identified above. First, it effectuates the legislative intent that bankruptcy judges consider SIPA cases, at a minimum, to the same extent that they consider Title 11 cases. Second, it reconciles statutory provisions, as a court must. *See United States v. Hansen*, 566 F. Supp. 162, 165 (DDC 1983), *later proceedings*, 464 U.S. 1042 (1984) and 772 F.2d 940 (1985), *cert. den.*, 475 U.S. 1045 (1986); *Watt v. Alaska*, *supra*, 451 U.S. at 267; *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Third, it does not arbitrarily consider as repealed a "specific" statute, *i.e.*, SIPA, which was designed to govern a SIPA liquidation proceeding, in favor of a statute of more general application, *i.e.*, BAFJA. *See Brown v. General Services Administration*, 425 U.S. 820, 834-35 (1976); *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168-69 (1976); *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228-29 (1957) (statute applicable to specific situation pre-empts general statute).

The removal aspect of section 78eee(b)(4) neither contradicts nor is inconsistent with the BAFJA. Section

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[7] A provision is inconsistent if it "conflicts with an explicit provision" of SIPA or if its application "would substantially impede the fair and effective operation of SIPA without providing significant countervailing benefits." *SIPC v. Charisma Sec. Corp.*, 506 F.2d 1191, 1195 (2d Cir. 1974). Since withdrawal would treat a SIPA liquidation like a bankruptcy case, as intended by Congress, there is no inconsistency.

[8] This was done, with SIPC's concurrence, in *SIPC v. Bevill, Bresler & Schulman, Inc.*, Civil Action No. 85-1715 (DRD) (D.N.J.). After removal and docketing of the case in bankruptcy court under section 78eee(b)(4), the district court used section 157(d) to withdraw the entire proceeding. Several firms related to the debtor in that case were involved in proceedings before the district court, and the SIPA liquidation could be administered most efficiently if all of the firms, including the debtor, were before the same court.

78eee(b)(4) is not impliedly repealed by the BAFJA and supplies the basis for the removal of SIPA liquidations to the bankruptcy courts.

2. The Powers, Duties, and Jurisdiction Clause of Section 78eee(b)(4)

Section 78eee(b)(4) also confers upon the bankruptcy courts the powers, duties, and jurisdiction under SIPA of the district courts. Under SIPA section 78eee(b)(2), the district court with which the application by SIPC is filed has exclusive jurisdiction of the debtor and its property, and exclusive jurisdiction of any suit against the trustee with respect to a SIPA liquidation. Unless inconsistent with SIPA, as mentioned above, the district court also has the jurisdiction, powers, and duties of a court having jurisdiction over Title 11 cases.

Under the BAFJA, the bankruptcy court exercises the district court's jurisdiction with respect to all cases under Title 11 and all "core" proceedings arising under Title 11, or arising in a case under Title 11, referred by the district courts. 28 U.S.C. §157(b)(1). Consistent with the foregoing section, the District Court has provided that "the bankruptcy judges of this district shall exercise the jurisdiction of this court in bankruptcy matters as provided in 28 U.S.C. §157(b)." GPO 1984-3, ¶2. The bankruptcy court's jurisdiction as to other matters is more limited. For example, in "non-core" proceedings related to Title 11 cases, absent the consent of the parties, the bankruptcy court only may submit proposed findings and conclusions to the district court for its consideration. 28 U.S.C. §157(c)(1).

With respect to the facts at hand, there is nothing in the BAFJA or in SIPA which would have limited the Bankruptcy Court's exercise of jurisdiction. Under SIPA section 78eee(b)(4), the bankruptcy court has the jurisdiction of a court "having jurisdiction over cases under title 11." Even under the BAFJA, and as provided in GPO 1984-3, the bankruptcy court would have considered, as here, proceedings to avoid preferences and fraudulent conveyances,

and those concerning the administration of the estate. 28 U.S.C. §§157(b)(2)(A), (F), and (H).

It bears emphasis that whether section 78eee(b)(4) permits bankruptcy courts to adjudicate what are essentially non-core "related proceedings" under the BAFJA is not at issue. The narrow question in this case, and the one to which the Court must confine its consideration, is whether SIPA provided authority for the Bankruptcy Court to adjudicate the instant "core" matters. To consider whether SIPA section 78eee(b)(4) confers overly broad powers on the bankruptcy courts, in some abstract situation, would be wholly improper. As stated in *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937):

> [Petitioner] seeks to bar all regulation by contending that regulation in a situation not presented would be invalid. Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances.

See First National Bank & Trust Co. v. Beach, 301 U.S. 435, 438 (1937) (A court must "refuse to be led away from the limitations of the concrete case."); *Marathon, supra*, 458 U.S. at 90 (Particularly in the area of Article III courts, a court must "never . . .anticipate a question of constitutional law in advance of the necessity of deciding it," and "never formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.") (Rehnquist, J., concurring). Under the facts of this case, section 78eee(b)(4) and the BAFJA are not "manifestly repugnant," and there is no implied repeal.

II. SECTION 78fff(b) SUPPLIES AN ADDITIONAL BASIS FOR JURISDICTION.

Even assuming *arguendo*, that section 78eee(b)(4) were invalid, SIPA section 78fff(b) supplies an alternate basis for jurisdiction. The fact that a provision of SIPA is held invalid does not affect the enforceability of the other sections of the statute. Thus, SIPA section 78bbb specifies

that except as otherwise provided in SIPA, the provisions of the Securities Exchange Act of 1934, 15 U.S.C. §78a *et seq.* ("the 1934 Act"), apply as if SIPA were a section of it. Under section 33 of the 1934 Act, 15 U.S.C. §78gg, the nullification of a provision of that act does not affect the validity of the remainder of the act.

There are two operative requirements in the first sentence of section 78fff(b). To the extent consistent with SIPA, the SIPA liquidation proceeding is to be conducted 1) "in accordance with" and 2) "as though it were being conducted under chapters 1, 3, 5 and subchapters I and II of chapter 7 of title 11." The provisions of Title 11 referred to in section 78fff(b) are *all* of the bankruptcy liquidation provisions of the Code, except for the stockbroker and commodity broker provisions. In order for the SIPA liquidation to be conducted "in accordance with" Title 11, sections 327, 329, 547, and 548 relied upon here, must be held to apply in a SIPA liquidation. *See In re Government Securities Corp.*, 972 F.2d 328, 330-331 (11th Cir. 1992), *cert. den.*, ___ U.S. ___ , 113 S. Ct. 1366 (1993).

Furthermore, because the SIPA liquidation must be conducted "as though it were being conducted" under the straight bankruptcy provisions of Title 11, the procedures that apply to Title 11 actions also must be deemed to apply to actions in SIPA liquidations. In the context of an ordinary bankruptcy case, this adversary proceeding raises "core" matters under 28 U.S.C. §157(b)(2)(A), (F), and (H), which automatically would be referred to the Bankruptcy Court under General Procedure Order No. 1984-3, and heard and considered by that court. If the second requirement of section 78fff(b) is to be implemented, there can be no different outcome here merely because the adversary proceeding is brought within a SIPA liquidation. The fact that a SIPA liquidation is simply an outright bankruptcy proceeding for all practical purposes has been consistently recognized. *See e.g., SIPC v. Ambassador Church Finance/Development Group, Inc., supra*, 788 F.2d at 1210; *SEC v. Albert & Maguire Securities Co.*, 560 F.2d 569, 572 (3d Cir. 1977); *Exchange National Bank*

of Chicago v. Wyatt, supra, 517 F.2d at 457-59. And, the conclusion that an adversary proceeding involving "core" matters, brought in the context of a SIPA liquidation, should be adjudicated no differently than the same proceeding in a bankruptcy case, comports with the result reached in all other SIPA cases. *See e.g., In the Matter of Perry, Adams and Lewis Securities*, 30 B.R. 845, 853-56 (Bankr. W.D. Mo. 1983); *In re Bell & Beckwith*, 54 B.R. 303, 306-308 (Bankr. N.D. Ohio 1985); *In re Blinder, Robinson & Co.*, 135 B.R. 899, 901 (D. Colo. 1992).

III. A SIPA LIQUIDATION PROCEEDING IS NOT EXCLUSIVELY A "TITLE 15" LIQUIDATION.

Because the adversary proceeding arises under Title 11 provisions that apply under SIPA section 78fff(b), the BAFJA itself supplies a basis of jurisdiction. Thus, 28 U.S.C. section 157(b)(1) which is part of the BAFJA authorizes bankruptcy judges to hear and determine core proceedings such as this one, arising under Title 11. In also providing that bankruptcy judges may hear and determine core proceedings arising in a Title 11 case, the BAFJA offers yet another basis for jurisdiction. Although the petitioners argue that SIPA cases and proceedings arise under Title 15 and not Title 11, and therefore, are beyond the scope of section 157, Cert. Pet. at 18-19, in fact, the SIPA liquidation proceeding is a Title 11 *and* a Title 15 case.

The SIPA "liquidation proceeding," defined at SIPA section 78*lll*(10), is the functional equivalent of the Title 11 "case." Within each may be brought adversary proceedings such as the one at hand, pursuant to various provisions of the Bankruptcy Code. See Bankruptcy Rule 7001. In determining whether the petitioners correctly characterize the liquidation proceeding or "case" as one under Title 15, it is important again to consider SIPA section 78bbb which makes SIPA a part of the 1934 Act, "except as otherwise provided in [SIPA]." The 1934 Act is contained in Title 15, and therefore, it stands to reason that the codifier, which is the Office of the I aw Revision

Counsel of the House of Representatives, would include SIPA in the same title.[9] But, in that regard, two points are significant.

One, as made evident by section 78bbb, Congress recognized that SIPA appropriately could be included under more than one title. The "[e]xcept as otherwise provided in [SIPA]" clause of section 78bbb relates to section 78fff(b). By specifying that a SIPA proceeding is to "be conducted in accordance with, and as though it were being conducted under" the liquidation provisions of Title 11, Congress recognized that the SIPA liquidation would proceed not only under Title 15, but under Title 11 as well. It is noteworthy that if Congress had viewed the SIPA liquidation proceeding as one only under Title 15, it could have amended the 1934 Act, in 1970, to include SIPA. Although various bills preceding H.R. 19333 (which was enacted as SIPA) proposed such an amendment,[10] Congress ultimately rejected these proposals. Instead, Congress specified in H.R. 19333 that SIPA simply would be considered a part of the 1934 Act,[11] except as otherwise provided in SIPA.

Two, the conclusion that the SIPA liquidation proceeding arises under Titles 11 and 15, also is supported by the fact that although SIPA has been designated to Title 15 by employees of the House of Representatives (*supra*, n.9), the title has never been enacted into positive law. In that regard, SIPA in Title 15, is only *prima facie* evidence of the statute as contained in the Statutes at Large. Under 1 U.S.C. section 204(a), unless enacted into positive law,

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[9] That Office "classif[ies] newly enacted provisions of law to their proper positions in the Code where the titles involved have not yet been enacted into positive law." 2 U.S.C. §285b(4).

[10] For example, Senate Bills 3988 and 3989 provided that the "Securities Exchange Act of 1934 is amended by adding [SIPA]." 116 Cong. Rec. 20334 (1970).

[11] See H. R. Rep. No. 1613, 91st Cong., 2d Sess. 4, *reprinted in* 1970 U.S. CODE CONG. & ADM. NEWS 5257. See also Pub. L. No. 91-598, 84 Stat. 1637 (1970).

matter contained in the United States Code establishes *prima facie* the laws of the United States. Where Congress has not enacted a codification into positive law, the statute in the Statutes at Large is the legal evidence of the law. In that situation, and in the event of a discrepancy between the statute in the United States Code and in the Statutes at Large, it is the latter which prevails over the former. *United States v. Welden*, 377 U.S. 95, 98 n. 4 (1964); *Stephan v. United States*, 319 U.S. 423, 426 (1943). Since Title 15 has not been enacted into positive law (see list of Titles following 1 U.S.C.A. §204), the decision to place SIPA under Title 15 has not been approved by Congress.[12] As such, Congress has never expressed an intent that SIPA be limited to that title. Because the instant adversary proceeding arises in a case that is under Title 11, as well as Title 15, the Bankruptcy Court had jurisdiction.

IV. THE DECISION OF THE COURT OF APPEALS IS NOT INCONSISTENT WITH GRANFINANCIERA.

Petitioners argue that in *Marathon*, this Court identified the only three situations in which the judicial power may be exercised by judges who have not been appointed under Article III of the Constitution. U.S. CONST. art. III, §1. In petitioners' view, these consist of territorial courts, military courts, and courts in which "public rights" questions are adjudicated. Petitioners further maintain that in *Granfinanciera*, this Court determined that fraudulent conveyance and preference cases involve private, and not public, rights. Because the instant suit was based largely on a preference and fraudulent conveyance, or assertedly "private" rights, the Bankruptcy Court, which is not an Article III court, allegedly lacked jurisdiction. Cert. Pet. at 35-

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[12] Indeed, in section 362 of the Bankruptcy Code, Congress treats the SIPA proceeding as one under Title 11. For example, section 362(a)(2) provides that the filing of a bankruptcy petition or a SIPA application for a customer protective decree stays enforcement of any judgment "obtained before the commencement of the case under this title." "This title" refers to Title 11.

38. The position is meritless for at least two reasons. First, *Marathon* and *Granfinanciera* do not stand for the broad propositions advanced by the petitioners, and the decision of the Tenth Circuit is not in conflict with them. Second, the Tenth Circuit's conclusion that the Bankruptcy Court had jurisdiction in view of the petitioners' submission of a claim against the Debtor is consistent with the decisions of this Court.

A. The Cases Cited By Petitioners Are Inapposite.

Marathon did not purport to define the entire breadth of matters which non-Article III judges may decide. It reflected the views of a divided court, with no majority opinion being written in the case. Justice Brennan issued a plurality opinion in which three of the Justices concurred. Two of the Justices joined in the judgment, but not the opinion, of the court. Three Justices dissented. Since the issuance of *Marathon* in 1982, the Court has clarified the intended application of its holding. It is now plain that *Marathon* stands for the more narrow proposition stated by the concurring Justices therein, and reiterated in the dissent. Thus, in *Thomas v. Union Carbide Agr. Products Co.*, 473 U.S. 568, 584 (1985), the Court observed:

> The Court's most recent pronouncement on the meaning of Article III is *Northern Pipeline*. A divided Court was unable to agree on the precise scope and nature of Article III's limitations. The Court's holding in that case establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review. . . .

See also *id.* at 585-586. This view was reaffirmed in *Commodity Futures Trading Com'n v. Schor*, 478 U.S. 833, 838-839 (1986).

In concurring in the *Marathon* judgment, Justice Rehnquist indicated that it would not be necessary for him to

decide whether "cases dealing with the authority of Congress to create courts other than by use of its power under Art. III . . . in fact support a general proposition and three tidy exceptions." 458 U.S. at 91. In light of the Court's later clarification that is in line with that position, the petitioners err in contending that *Marathon* reflects a broader holding. Whether or not petitioners correctly assert that public rights are not at issue in the instant proceeding brought within a SIPA case, *Marathon* did not divest the bankruptcy court of jurisdiction.[13]

Likewise, *Granfinanciera* offers the petitioners no support. In response to *Marathon*, Congress reconstituted the jurisdiction of the bankruptcy courts. In keeping with *Marathon*, the BAFJA distinguished "core" from "non-core" proceedings. The former included those that were "integral to the core bankruptcy function of restructuring the obligations of the debtor and his creditors." 130 Cong. Rec. H1848 (daily ed. March 21, 1984) (statement of Representative Kindness). The latter "Marathon-type suits" were concerned with "State law issues that did not arise in the core bankruptcy function of adjusting debtor-creditor rights." *Id.*

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[13] In fact, public rights *are* at stake because this proceeding arises within a SIPA case. Because SIPA is rooted not only in the bankruptcy clause, but in the commerce clause, U.S. CONST. art. I, §8, cl. 3 and 4, "the power of Congress to modify substantial rights [by means of SIPA] rests upon a broad and substantial base." *SEC v. Albert & Maguire Sec. Co.*, 378 F.Supp. 906, 911, 912 (E.D. Pa. 1974). This Court has recognized that public rights arise when "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, [has] create[d] a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." *Granfinanciera*, 492 U.S. at 54. A trustee's capacity to recover monies owed to an estate is an integral part of the SIPA scheme. To the extent such funds are not recovered, SIPC advances monies to compensate for any shortfall to public investors and to satisfy the administrative expenses of the liquidation. SIPA §78fff-3(a) and (b). Should the SIPC fund become inadequate, the taxpayer's monies are used to meet those obligations. §78ddd(g) and (h). Thus, "public rights" are directly implicated in this adversary proceeding.

In *Granfinanciera*, a trustee in bankruptcy had sued to avoid an allegedly fraudulent conveyance under the Bankruptcy Code. Having filed no claim in the underlying bankruptcy case, the petitioners in that proceeding made a timely request for a jury trial. The issue decided in *Granfinanciera* was whether, under the circumstances, the Seventh Amendment afforded the petitioners a right to a jury trial notwithstanding that fraudulent conveyance actions were denominated as "core" proceedings in 28 U.S.C. section 157(b)(2)(H). U.S. CONST. amend. VII.

Because the right to a jury trial is preserved in "Suits at common law" in which legal, instead of equitable, rights are to be determined, the Court initially considered whether 1) historically, the action had been brought at law or in equity; and 2) the remedy sought was legal or equitable. 492 U.S. at 42. However, even if one concluded from that inquiry that a jury trial was available, the right nevertheless could be denied if "public rights" were at stake. *Id.* at 51. Although the Court determined that the fraudulent conveyance in that case seemed "more accurately characterized as a private rather than a public right," *id.* at 55, it declined to consider whether such suits could be adjudicated by bankruptcy courts.[14] *Id.* at 64.

For purposes of the instant petition, it is important to identify the precise issue in *Granfinanciera*. That issue, which repeatedly has been identified solely as one of entitlement to a jury trial,[15] is *not* before this Court. The petitioners in the case at hand never requested a jury trial.

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[14] Indeed, if the Court had concluded that fraudulent conveyance suits could not be determined by bankruptcy courts, it would not have left open the possibility, as it did, that the jury trial might be held before the bankruptcy court. 492 U.S. at 61-64.

[15] See *In re Great American Manufacturing and Sales, Inc.*, 129 B.R. 633, 636 (C.D. Cal. 1991); *In re Southern Indus. Banking Corp.*, 126 B.R. 294, 296-297 (E.D. Tenn. 1991); *City Fire Equip. Co. v. Ansul Fire Protection*, 125 B.R. 645, 649 (N.D. Ala. 1989); *In re Ben Cooper, Inc.*, 896 F.2d 1394, 1401 (2d Cir.), *vacated and remanded*, 498 U.S. 964 (1990), *reinstated*, 924 F.2d 36 (2d Cir.), *cert. den.*, ___ U.S. ___, 111 S. Ct. 2041 (1991).

See Bankruptcy Rule 9015 (abrogated March 30, 1987); Fed. R. Civ. Pro. 38(b). Nor did they request the District Court to withdraw the reference to the Bankruptcy Court. 28 U.S.C. §157(d). Nor did they combine the two as would have been necessary in order to be deemed not to have waived the right. *In re Latimer*, 918 F.2d 136, 137 (10th Cir. 1990), *cert. den.*, ___ U.S. ___ , 112 S. Ct. 186 (1991).

The question which *is* at hand, namely, whether bankruptcy courts have jurisdiction over preference, fraudulent conveyance, and administration matter suits, was not raised or addressed in *Granfinanciera*. As to that question, the decision of the Tenth Circuit is fully consistent with the pertinent case law. Thus, the authority of bankruptcy courts to consider such actions consistently has been recognized. See, *e.g.*, *John E. Burns Drilling Co. v. Central Bank of Denver*, 739 F.2d 1489, 1493-1494 (10th Cir. 1984); *In re Committee of Unsecured Creditors of F S Comm.*, 760 F.2d 1194, 1199 (11th Cir. 1985); *Matter of Wood*, 825 F.2d 90, 97 (5th Cir. 1987); *In re Mankin*, 823 F.2d 1296, 1299-1310 (9th Cir. 1987), *cert. den.*, 485 U.S. 1006 (1988); *Stein v. Miller*, 158 B.R. 876, 879-880 (S.D. Fla. 1993); *In re Roppolo*, 111 B.R. 113, 115 (Bankr. W.D. La. 1990). *See also* 1 *Collier on Bankruptcy*, ¶3.01 at pp. 3-42—3-43 (15th ed. 1992) ("[n]o constitutional infirmity to assigning avoiding action jurisdiction to bankruptcy judges").

The cases relied upon by the petitioners do not suggest otherwise. *In re Orion Pictures Corp.*, 4 F.3d 1095 (2d Cir. 1993), Cert. Pet. at 44, which involved the right to a jury trial in a non-core pre-petition breach of contract action, is irrelevant. Similarly, *In re Davis*, 899 F.2d 1136 (11th Cir. 1990), *cert. den. sub nom., Gower v. Farmers Home Admin.*, 498 U.S. 981 (1990), Cert. Pet. at 45-47, raises no conflict. In that case, the trustee sued to avoid a preferential transfer, and upon prevailing in the suit, sought an award of attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. §2412 ("EAJA"). The jurisdiction of the bankruptcy court to consider the asserted preference was not challenged. The only question concerned the bankruptcy court's authority to determine the EAJA aspect of

the suit, a non-core matter committed by statute to consideration by Article III courts. 899 F.2d at 1138-1139. In *dictum*, the *Davis* court noted that this Court, in *Granfinanciera*, had strongly suggested that fraudulent conveyance and preference suits involve private rights, but had "specifically avoided holding" that such suits must be tried by Article III courts. The Eleventh Circuit observed that the question was not before it, and accordingly, it would express no opinion as to its merits.[16]

B. The Bankruptcy Court Had Jurisdiction Because the Petitioners Filed a Claim and Counterclaims.

The Bankruptcy Court had jurisdiction not only because this is a "core" proceeding, but because the filing of a claim by Mr. Davis and of counterclaims by both of the petitioners subjected them to that court's jurisdiction. As mentioned above, Mr. Davis filed a claim with the Trustee. The Trustee issued no claim determination and instead, instituted this adversary proceeding. Additionally, in their Answer, Grounds of Defense, and Counterclaim, to the complaint herein, the petitioners asserted two counterclaims. Under the first, they sought repayment of certain expenditures allegedly made in connection with their representation of IBI. Under the second, they contended that the Trustee had refused to release stock in Mr. Davis's name. The stock was the subject of the claim filed with the Trustee. Petitioners requested that the Bankruptcy Court enter judgment for them on both counterclaims.

Citing *Katchen v. Landy*, 382 U.S. 323 (1966) ("*Katchen*"), the Tenth Circuit concluded that the filing of a claim against the estate in this case reinforced the con-

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[16] Petitioners contend that the trial in this case should have been held before the District Court because the subsequent review by that court resulted in their receiving "only a second-hand determination" of credibility and factfinding. Cert. Pet. at 41. It is curious that factfinding and observation of the demeanor of witnesses suddenly have become important, when earlier in the case, in moving for summary judgment, petitioners represented that "there [was] no genuine issue as to any material fact."

clusion that the Bankruptcy Court had jurisdiction. A19. Petitioners now argue that the claim should be disregarded because it was filed in a SIPA proceeding and in their view, not in a Title 11 case, and that in any event, the adversary proceeding should have been considered, as an initial matter, by an Article III judge. Cert. Pet. at 48-62. Petitioners' arguments are made for the first time, and should be disregarded as untimely. *Taylor v. Freeland & Kronz*, ___ U.S. ___, 112 S. Ct. 1644, 1649 (1992); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Duignan v. United States*, 274 U.S. 195, 200 (1927). Timeliness aside, the arguments raise no issue worthy of review.

1. The Consent to Jurisdiction

In *Katchen*, this Court stated:

> "By presenting their claims respondents subjected themselves to all the consequences that attach to an appearance. * * *
>
> * * * * * * *
>
> "Respondents' contention means that, while invoking the court's jurisdiction to establish their right to participate in the distribution, they may deny its power to require them to account for what they misappropriated. In behalf of creditors and stockholders, the receivers reasonably may insist that, before taking aught, respondents may by the receivership court be required to make restitution. That requirement is in harmony with the rule generally followed by courts of equity that, having jurisdiction of the parties to controversies brought before them, they will decide all matters in dispute and decree complete relief." ***
>
> Our examination of the structure and purpose of the Bankruptcy Act and the provisions dealing with allowance of claims therefore leads us to conclude, and we so hold, that the Act does confer summary jurisdiction to compel a claimant to surrender preferences that under §57, sub. g would require disallowance of the claim. [Citation omitted].

382 U.S. at 335.[17]

By filing a claim in the SIPA proceeding, for the reasons discussed *infra*, Mr. Davis invoked the jurisdiction of the Bankruptcy Court. The fact that the claim was filed in a SIPA proceeding with the Trustee warrants no different conclusion. SIPA §78fff-2(a)(2). See Cert. Pet. at 49-51. "Claim" is broadly construed and includes any "right to payment," such as that asserted by Mr. Davis. See 11 U.S.C. §101(5) and SIPA §78fff(b). See also *Johnson v. Home State Bank*, ___ U.S. ___, 111 S. Ct. 2150, 2154 (1991) (claim includes broadest possible definition). Even assuming, *arguendo*, that the claim had to be filed with the Bankruptcy Court, as Petitioners assert, the submission in the adversary proceeding of a counterclaim premised on Mr. Davis's claim in the SIPA liquidation proceeding amounted to the filing of a "claim" with the court. See *infra*. The contention that the SIPA claim does not imply consent because "the SIPA claims process is not subject to the control and supervision of the bankruptcy judge," Cert. Pet. at 50-51, also is erroneous. In fact, the Trustee sought and obtained approval from the Bankruptcy Court with regard to his actions concerning the claims process. Thus, on July 24, 1981, the Bankruptcy Court issued an order governing the mailing of claim forms to customers and other creditors, setting the period for the filing of claims, and directing that claims be filed with the Trustee.

By counterclaiming, Davis, Gillenwater & Lynch also subjected itself to the jurisdiction of the Bankruptcy Court. Thus, a counterclaim constitutes a "claim." *Bayless v. Crabtree Through Adams*, 108 B.R. 299, 305 (W.D. Okl. 1989), *aff'd.*, 930 F.2d 32 (10th Cir. 1991); *In re Allied*

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[17] Section 57g of the Bankruptcy Act, 11 U.S.C. §93g (repealed 1979), was the predecessor to section 502(d) of the Bankruptcy Code, 11 U.S.C. §502(d). Under both sections, any preference or fraudulent transfer issues asserted by a trustee against a claimant must be resolved before the claim can be allowed. *Germain v. Connecticut Nat. Bank*, 988 F.2d 1323, 1327 n.5 (2d Cir. 1993).

Companies, Inc., 137 B.R. 919, 924-925 (Bankr. S.D. Ind. 1991).

2. Adjudication by a Non-Article III Court

The authority relied upon by the petitioners for their contention that in any event, they were entitled to an adjudication by an Article III judge, is confusing at best. On the one hand, they assert that "*Granfinanciera* establishes conclusively that a matter involving private rights ought not be adjudicated in a non-Article III Court." Cert. Pet. at 37. On the other, *Granfinanciera* is a "Seventh Amendment [case]," that "simply [does] not address fully the jurisdictional issue of whether petitioner is entitled to an Article III adjudication in equity." *Id.* at 57-58. In fact, Petitioners can point to no persuasive authority because there is none. The law is clear that because the amounts, if any, owed to the petitioners by the estate could not be decided until the amounts owed by them had been determined, the Trustee's action to recover those sums became "integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's *equity jurisdiction*." *Langenkamp v. Culp*, 498 U.S. 42, 44 (1990) (emphasis in original). See *Granfinanciera*, 492 U.S. at 57-59; *In re Blinder, Robinson & Co.*, 135 B.R. 899, 901-902 (D. Colo. 1992); *In re Hooker Investments, Inc.*, 937 F.2d 833, 838-840 (2d Cir. 1991); *In re Jensen*, 946 F.2d 369, 373 (5th Cir. 1991).

This case presents no conflict between court decisions and does not present the type of important question warranting review. It is significant only to the parties involved, and has no implications other than in the narrow body of SIPA cases. In the end, the petition is no more than an effort by the petitioners to prolong this matter needlessly in the hope ultimately of escaping their obligations under the Bankruptcy Code, at the expense and to the detriment of the Debtor's estate and its creditors.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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STATUTORY APPENDIX

Section 2 of the Securities Investor Protection Act, 15 U.S.C. §78bbb (1988):

> APPLICATION OF SECURITIES EXCHANGE ACT OF 1934
>
> Except as otherwise provided in [SIPA], the provisions of the Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.] (hereinafter referred to as the "1934 Act") apply as if [SIPA] constituted an amendment to, and was included as a section of, such Act.

Section 6(b) of the Securities Investor Protection Act, 15 U.S.C. §78fff(b) (1988):

> APPLICATION OF TITLE 11
>
> To the extent consistent with the provisions of [SIPA], a liquidation proceeding shall be conducted in accordance with, and as though it were being conducted under chapters 1, 3, and 5 and subchapters I and II of chapter 7 of title 11. For the purposes of applying such title in carrying out this section, a reference in such title to the date of the filing of the petition shall be deemed to be a reference to the filing date under [SIPA].

Section 5(b)(4) of the Securities Investor Protection Act, 15 U.S.C. §78eee(b)(4), *prior to amendment* (1978):

> REFERENCE TO REFEREE IN BANKRUPTCY—If the court issues a protective decree and appoints a trustee under this section, such court may, at any stage of the proceeding, refer the proceeding to a referee in bankruptcy to hear and determine any or all matters, or to a referee in bankruptcy as special master to hear and report generally or upon specified matters. Only under special circumstances shall a reference be made to a special master who is not a referee in bankruptcy.

Section 547(b) of the Bankruptcy Code, 11 U.S.C. §547(b) (1988):

§547. Preferences

* * *

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property—

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made—

(A) on or within 90 days before the date of the filing of the petition; or

(B) between 90 days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if—

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

Section 548(a) of the Bankruptcy Code, 11 U.S.C. §548(a) (1988):

§548. Fraudulent transfers and obligations.

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

(1) made such transfer, or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(2) (A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

1 U.S.C. Section 204(a) (1988):

> **United States Code.**—The matter set forth in the edition of the Code of Laws of the United States current at any time shall, together with the then current supplement, if any, establish prima facie the laws of the United States, general and permanent in their nature . . . *Provided, however*, That whenever titles of such Code shall have been enacted into positive law the text thereof shall be legal evidence of the laws therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States.